MOTION FILED

JUN 12 2003

(3)

No. 02-1646

In The
Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a
DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE OHIO COUNCIL OF RETAIL MERCHANTS, KENTUCKY RETAIL FEDERATION, INC., AND TENNESSEE COUNCIL OF RETAIL MERCHANTS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF PETITIONER THE HIGBEE COMPANY, d/b/a DILLARD DEPARTMENT STORES, INC.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants respectfully move the Court, pursuant to Rule 37.2(b), for leave to file a brief as amici curiae in this matter in support of the Petition for a Writ of Certiorari. Movants have been unable to secure the consent of Respondent to the filing of their brief.

Movants are state-wide trade associations that have represented thousands of retailers, from large department stores and chain drug stores to independently-owned businesses, for as long as 80 years. They have followed the instant litigation with great interest, and all three participated as amici curiae in the proceedings below. Movants can offer the Court a unique perspective on the issues raised by Petitioner and the practical importance of those issues for merchants everywhere. Finally, they strongly believe that the United States Court of Appeals for the Sixth Circuit erred in extending the "full and equal benefit" clause of 42 U.S.C. § 1981(a) to non-governmental actors, including their members, and seek the opportunity to address those issues.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amicus Curiae Ohio Council of Retail Merchants ("OCRM") is a state-wide trade association representing over 3,000 companies, ranging from large department stores, supermarkets, and chain drugstores, to independently-owned retail businesses that sell furniture, appliances, clothing, and other goods. Founded in 1922, OCRM has served legislators, government officials, courts, media, and the public as the voice of retailing for over 80 years.

Amicus curiae Kentucky Retail Federation, Inc., is a state-wide retail trade association with over 2,200 direct members and many associate members. It includes retailers of all types and of all sizes throughout the Commonwealth of Kentucky. Originally established in 1939 as the Kentucky Chain Store Council, it expanded to include independent retailers and took its present form in 1964. It represents the retail industry through government relations activities, direct member services, and efforts to provide education and information to the industry and to the general public.

Amicus curiae Tennessee Council of Retail Merchants is a state-wide trade association representing retail merchants in Tennessee. It is a non-profit corporation organized in 1991 to communicate information and to protect the business interests of retailers.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

All three Amici Curiae have a vital interest in the legal issue underlying these proceedings, and they urge the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Amici Curiae are extremely concerned about the negative effects that the ruling below will have on their members, on the courts, and on the doctrine of federalism if it is not reviewed and reversed by this Court. In particular, the expansive scope that ruling accords to the "full and equal benefit" clause of 42 U.S.C. § 1981 would federalize all state statutory and common law claims that assert a racial animus, imposing severe – and wholly unnecessary – burdens on the members of Amici Curiae.

Retailers must constantly guard against losses from shoplifting and theft, which cost them over $32 billion annually in this country. Inventory "shrinkage" in retail stores has become the single largest category of larceny in the United States, costing merchants almost two percent of their total annual sales. Under the best of circumstances, these crimes reduce profits and increase the prices that consumers must pay. In other cases, they threaten the financial viability of a business and the continued existence of the jobs that it sustains.

Confrontations with suspected shoplifters often elicit charges of racial bias, even where, as in the present case, Chapman and the security guard were both African-American women. Adequate legal remedies are currently available under state law for any resulting legal claims. Retailers should not be saddled with the additional unnecessary expense of litigating shoplifters' Section 1981(a) lawsuits in federal courts. There is no legal or logical justification for federalizing a vast array of state law claims against retail merchants.

Accordingly, Amici Curiae join with Petitioner in urging the Court to grant the petition for a writ of certiorari in this matter.

SUMMARY OF THE ARGUMENT

Amici curiae, Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants, urge the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this matter. The Court should review and reverse the ruling below to provide guidance to lower courts regarding the proper scope of the "full and equal benefit" clause of 42 U.S.C. § 1981(a). Only this Court's intervention can resolve the ongoing conflict among the different circuits as to whether that clause is directed to state action only or whether it also encompasses purely private conduct.

The opposing views that the federal courts have expressed on that question suggest that the statute is ambiguous. Even if it is facially unambiguous, federal courts have long recognized that they must look beyond the literal language of a statute when a literal reading leads to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress.

The construction of Section 1981 by the en banc majority below fails on all three counts. First, it leads to internal inconsistencies by prohibiting conduct that is impossible. If subsection (c) of the statute extends all of the proscriptions included in subsection (a) of the statute to private actors, it forbids non-governmental actors from doing what they already, by definition, cannot do, *e.g.*,

discriminate in levying taxes and deprive litigants of proper judicial proceedings. Second, the interpretation adopted by the en banc ruling below leads to the absurd result of federalizing vast amounts of state statutory and common law, going far beyond anything Congress has previously done in this area of law. Third, and finally, it is inconsistent with the intent of Congress, which indisputably enacted Section 1981(c) in order to define the scope of claims under the "make and enforce contracts" clause of Section 1981(a), and not to radically remake civil rights law and upset the balance of federalism in this country.

Accordingly, Amici Curiae respectfully support Petitioner in these proceedings and urge the Court to grant its petition for a writ of certiorari.

ARGUMENT

1. Introduction. Amici Curiae Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants support Petitioner The Higbee Company, d/b/a Dillard Department Stores, Inc., in urging the Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this matter.

The Court should review the en banc ruling below because it escalates an ongoing conflict among different circuits on an important question of federal law: whether the "full and equal benefit" clause of 42 U.S.C. § 1981(a) applies only to state action, or whether it encompasses purely private conduct as well. Only the Supreme Court of the United States can resolve that conflict.

In the past, this Court and Congress have addressed the scope of the "make and enforce contracts" clause and other language in § 1981(a). However, there is still no authoritative guidance for adjudicating claims asserted under the "full and equal benefit" clause. The resulting fissure in the decisions of the United States Courts of Appeals regarding the applicability of the "full and equal benefit" clause to private acts by non-governmental actors is not merely a theoretical issue. The varying legal standards used by courts in different circuits thwart the uniform application of federal civil rights laws.

The substantive question at the root of the lower courts' conflicting decisions also raises important issues of federalism that merit this Court's review. If the en banc decision of the Court of Appeals for the Sixth Circuit is not reviewed and reversed, it will effectively federalize any asserted violation of state statutory or common law in which a racial animus is alleged.

For example, unfounded accusations of racial discrimination are not an uncommon response when retail security personnel confront suspected shoplifters. The retail merchants represented by Amici Curiae must bear the resulting costs and other burdens if the "full and equal benefit" clause of Section 1981(a) can be invoked to make a federal case out of these purely private interactions. Significantly, Respondent Chapman does not contend that existing legal protections are inadequate in any way; she argues instead that a federal forum and a federal remedy should be added to the arsenal of claims that are admittedly already available to redress the wrong she alleges in this litigation.

As set forth below, there can be little doubt that the "full and equal benefit" clause is limited in purpose and effect to conduct by governmental actors, and it is unnecessary and unwise to expand its reach to encompass purely private conduct. Accordingly, Amici Curiae support Petitioner in urging the Court to grant the petition for a writ of certiorari in this matter.

2. Section 1981(c). Respondent Chapman argues that subsection (c) of the statute unambiguously subjects private actors to every clause of subsection (a) of the statute, including the "full and equal benefit" clause. The initial panel of the Court of Appeals for the Sixth Circuit agreed with Respondent that the statute is unambiguous, but it concluded that subsection (c) does *not* extend the scope of the "full and equal benefit" clause to private actors. The Court en banc voted 6-3 to reverse that ruling, after it concluded that the statute unambiguously extends the "full and equal benefit" clause to purely private conduct. In these circumstances, the statutory language is *ambiguous* by any realistic definition of that term.

However, the judicial task would not be at an end in this case even if the language of Section 1981(c) appeared to be clear on its face:

> The court must look beyond the language of the statute, however, when the text is ambiguous or when, although the statute is facially clear, a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress.

Vergos v. Gregg's Enterprises, Inc., 159 F.3d 989, 990 (6th Cir. 1998), citing *United States v. Turkette*, 452 U.S. 576,

580 (1981). Each of the three specified grounds for statutory interpretation applies here, and each provides a separate and independent basis for finding that the "full and equal benefit" clause of Section 1981(a) applies only to state action. Considered together, they provide compelling reasons to review the ruling below and restore uniformity to lower court interpretations of this federal civil rights law.

3. Internal inconsistencies. As noted above, a court "must look beyond the language of [a] statute" when "a literal interpretation would lead to internal inconsistencies." *Vergos*, *supra*. The relevant language of Section 1981 falls squarely within that rule.

Congress amended Section 1981 in 1991 by adding subsection (b), which specifies, inter alia, that the right to "make and enforce contracts" continues after a contract is formed, and subsection (c), which provides that "[t]he rights protected by this section are protected against impairment by non-governmental discrimination and discrimination under color of state law." 42 U.S.C. § 1981(c).

Respondent Chapman contends that subsection (c) of the statute proscribes private actors from infringing *all* four of the categories of rights set out in subsection (a) of the statute: "to make and enforce contracts"; "to sue, be parties, give evidence"; "to the full and equal benefit of all laws and proceedings for the security of persons and property"; *and* to be "subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind." 42 U.S.C. § 1981(a).

Some of the rights included in Section 1981(a) – such as the right to make contracts – involve conduct that can

be engaged in by either private or governmental actors. However, other categories of rights found in Section 1981(a) – such as the clauses guaranteeing the "full and equal benefit of all laws and proceedings" and "like punishment, pains, penalties, taxes, licenses, and exactions" – include conduct that is *exclusively governmental in nature* and therefore cannot be engaged in by private actors. Accordingly, Respondent Chapman's interpretation of Section 1981(c) yields internal inconsistencies in the statute.

For example, the power to tax is indisputably the sole prerogative of *governments*. "Only the state imposes or requires 'taxes, licenses, and exactions'. . . . " *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3d Cir. 1977). A private person cannot possibly discriminate against someone through dissimilar taxation, because a private person has no legal capacity to impose or collect taxes. Respondent Chapman's "unambiguous" interpretation of Section 1981(c) should be rejected for this reason alone: it produces the internal inconsistency of proscribing conduct by private persons that only governmental actors can perform.

Similarly, only the government can deprive a person of the "full and equal benefit of all laws and proceedings," because only the government operates the judicial machinery that provides legal proceedings and resolves disputes over legal rights. "[I]t is only the state, acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law." *Mahone v. Waddle*, *supra*, 564 F.2d at 1029. Once again, Respondent Chapman's interpretation of Section 1981(c) leads to an internal inconsistency: prohibiting public acts that private actors cannot perform.

Amici Curiae urge the Court to reach the common sense conclusion that Section 1981(c) does not extend the scope of every clause in Section 1981(a) to private actors.

4. Absurd results. A court must also look beyond the language of a statute when a "literal interpretation" would lead to "an absurd result." *Vergos, supra*. In the present case, the interpretation of Section 1981 adopted by the en banc majority below – *i.e.*, that subsection (c) extends the scope of every clause of subsection (a) to purely private conduct – would lead to the "absurd result" of federalizing all alleged violations of state statutory or common law in which a racial animus is alleged.

The en banc decision of the Court of Appeals adopted Respondent's reading of Section 1981(c). If the Court does not review and reverse that ruling, every private act of purported discrimination, real or imagined, will be actionable in federal court under federal law. "Extending the 'equal benefit' clause to private conduct would have the effect of federalizing all racially-motivated state-law torts that implicate 'the security of persons and property'. . . . [T]he court sees no limiting principle to prevent its becoming the 'general federal tort law' the Supreme Court has expressly rejected." *Spencer v. Casavilla*, 839 F. Supp. 1014, 1019 (S.D. N.Y. 1993), *aff'd in part on other grds*, 44 F.3d 74 (2d Cir. 1994).

The Court of Appeals should have rejected Respondent Chapman's interpretation of Section 1981(c) because it leads to the absurd result of federalizing vast areas of state law and upsetting the traditional balance between state and federal authority. This consideration, standing alone, is important enough to warrant review of the decision below.

5. Intent of Congress. Finally, a court must also look beyond a literal interpretation of a statute if it is inconsistent with the intent of Congress. *Vergos*, *supra*, 489 U.S. at 241. In the present case, Congress indisputably intended precisely the opposite result that the en banc majority reached below. The legislative record *unequivocally* establishes that it was not Congress' intent to eliminate the state action requirement for suits brought under the "full and equal benefit" clause of Section 1981(a) when it enacted subsection (c).

It is undisputed that Congress added subsection (c) to Section 1981 for the purpose of codifying the ruling in *Runyon v. McCrary*, 427 U.S. 160, 175 (1976), which applied the "make and enforce contracts" clause of Section 1981(a) to private conduct. *See* H. Rep. No. 40, 102d Cong. 1st Sess., Part II, at 37:

> This subsection [(c)] is intended to codify *Runyon v. McCrary* . . . [in which] the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, *contracting*.

(Emphasis added.) The House Report reiterated Congress' intention that subsection (c) of the statute was added in order to "prohibit racial discrimination *in all contracts*, both public and private." *Id.* (emphasis added). *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[t]he authoritative source for finding the Legislature's intent lies in the Committee's reports on the bill").

In addition, the title Congress gave to subsection (c) – "Prohibiting discrimination in private contracting" – demonstrates that it was intended to abrogate the state action requirement as to the "make and enforce contracts"

clause. *See* H. Rep. No. 40, *supra*, at 37. Indeed, Congress entitled the Civil Rights Act of 1991 "Restoring Prohibition Against All Racial Discrimination *in the Making and Enforcement of Contracts*." *Id.*, at 35 (emphasis added). *See I.N.S. v. Nat. Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"). Thus, the title of the Act, the title of the relevant subsection, the legislative history, and Congress' avowed purpose in enacting 42 U.S.C. § 1981(c) each contradict the expansive interpretation of the statute adopted by the Court of Appeals.

Two United States Courts of Appeals that previously addressed this specific issue concluded that subsection (c) does not expand the scope of the "full and equal benefit" clause of Section 1981 to private action. In *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F. 3d 851, 855 (8th Cir. 2001), *cert. den.*, 535 U.S. 1017 (2002), as in the present case, a customer brought suit against a retail store for violation of the "full and equal benefit" clause of Section 1981 after he was detained by store employees on suspicion of shoplifting; the Court of Appeals for the Eighth Circuit held that the clause applies only to *state* action and dismissed the claim. *See also Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001). In *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 799 (3d Cir. 2001), the Court of Appeals for the Third Circuit cited and endorsed the "substantial line of authority holding that only state actors can be sued under the 'full and equal benefit' clause of § 1981."

The en banc majority in the present case erred when it reached the opposite conclusion and held that the clause encompasses purely private conduct. Amici Curiae urge

the Court to review the ruling below and restore the uniform interpretation and application of Section 1981(a) that Congress intended.

CONCLUSION

Amici Curiae retail trade associations urge the Court to grant the petition for a writ of certiorari in this matter. The ruling below, if not reviewed and reversed by this Court, would create a sweeping new federal tort that federalizes a vast array of state law claims under the "full and equal benefit" clause of 42 U.S.C. § 1981(a). Respondent has never claimed that existing state law remedies are inadequate, and there is thus no legal or logical reason to expand the scope of the "full and equal benefit" clause beyond its historical limitation to governmental conduct.

The decision below rests solely upon an interpretation of the language of 42 U.S.C. § 1981(c) that leads to internal inconsistencies, such as forbidding private individuals from levying unfair taxes, and to the absurd result of federalizing much of state tort law. It also contradicts the relevant legislative history, the title of the statutory provision, and Congress' stated purpose in enacting the legislation. Not surprisingly, that interpretation has been specifically rejected by other United States Courts of Appeals that have addressed the issue, resulting in a conflict among the circuits that only this Court can resolve.

Amici Curiae urge the Court to review and reject this attempt to convert alleged violations of state laws by private individuals into federal lawsuits, under the guise of the "full and equal benefit" clause of 42 U.S.C.

§ 1981(a), by granting the petition for a writ of certiorari in this matter.

Respectfully submitted,

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